STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL KOSS,

Plaintiff-Appellant,

v

A & A TRANSPORTATION SERVICES, INC, ILYA GERZAN, and ANNA GERZAN,

Defendants-Appellants.

UNPUBLISHED
September 21, 2006

No. 269411
Oakland Circuit Court
LC No. 04-063191

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff worked as an independent contractor driving a taxicab for defendant A & A Transportation Services, Inc., which dispatched its cabs from a building owned by the Gerzan defendants. To check for available work on the evening of February 12, 2004, plaintiff parked his own car in the back or north side of the building before walking to the dispatch office on the west side of the building. Plaintiff learned no work was available and left the building twenty to forty-five minutes after arriving. He retraced the same route through the icy parking area toward his car he had successfully traversed earlier but fell, injuring his scrotum and perineum. Soon he developed Fournier's gangrene. Plaintiff brought this premises liability action. After discovery, the trial court granted defendants' motion for summary disposition on the basis of the open and obvious doctrine. Plaintiff appeals by right. We affirm.

We review de novo a trial court's decision on a motion for summary disposition. *Teufel v Watkins*, 267 Mich App 425, 426; 705 NW2d 164 (2005). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In reviewing the motion, the trial court and this Court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A court properly grants summary disposition under MCR 2.116(C)(10) when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

To establish a prima facie case of negligence, plaintiff must prove (1) that defendants owed him a duty, (2) that defendants breached the duty, (3) that defendants' breach of the duty

caused plaintiff's injuries, and (4) that plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Teufel, supra* at 427. In general, a party in control of a premises owes invitees a duty to exercise reasonable care to protect them from dangerous conditions on the land that present an unreasonable risk of harm. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998); *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). But this duty does not extend to the removal of open and obvious dangers unless special aspects render the condition unreasonably dangerous. *Id*. at 516-517. Thus, a premises possessor must take reasonable steps within a reasonable period of time after an accumulation of snow and ice occurs to lessen the hazard of injury only if there is some special aspect that makes the condition unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004). Generally, an open and obvious accumulation of snow or ice will not by itself present any "special aspects" rendering it unreasonably dangerous. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005).

Plaintiff argues that the trial court erred by ruling that the icy parking area where he fell was an open an obvious condition. We disagree. To determine if a condition is open and obvious, a court must assess whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This is an objective test that applies the reasonably prudent person standard. *Mann, supra* at 329. Thus, the condition of the premises, not the condition of the plaintiff, must be assessed to determine if a reasonably prudent person in the plaintiff's position would foresee the danger. *Id*.; *Joyce, supra* at 238-239.

Plaintiff argues that because it was dark when he exited the building and because artificial lighting did not illuminate the area, a question of fact was created whether the icy condition was open and obvious. In applying the reasonable person standard to determine if a condition is open and obvious, it is appropriate to consider plaintiff's actual knowledge of the condition. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002); *Joyce, supra* at 239-240. Here, plaintiff's testimony establishes he was fully aware of what he described as an "ice wasteland" because he had successfully traversed the area to enter the building from his parked car. As our Supreme Court observed in *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16, 643 NW2d 212 (2002), "anyone encountering [frost or ice on a roof] would become aware of the slippery conditions." The trial court did not err by concluding as a matter of law that the ice-covered parking area was an open and obvious hazard. *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 66; ___ NW2d ___ (2006).

Plaintiff also argues that even if the icy condition was open and obvious, special aspects rendered it unreasonably dangerous. A "special aspect" making even an open and obvious condition unreasonably dangerous may exist when evidence shows that the condition is "effectively unavoidable," creating a "uniquely high likelihood of harm," or when the condition creates "an unreasonably high risk of severe harm." *Lugo, supra* at 518-519. Like determining whether a condition is open and obvious, the test to determine whether a "special aspect" renders a condition unreasonably dangerous is an objective one applying the reasonably prudent person standard. *Mann, supra* at 329. That is, the condition of the premises must be objectively considered, not the particular circumstances of the plaintiff. *Id*. Accordingly, in considering whether a "special aspect" is present, "it is important to maintain the proper perspective, which is

to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case." *Lugo, supra* at 518 n 2.

Here, plaintiff argues the icy condition was effectively unavoidable because he was required to park in back of the building and because other routes he could have taken were also ice covered. We disagree. Because a number of alternatives were available to plaintiff, his trek across the icy rear parking area on the day of his fall was not "effectively unavoidable."

This Court has reached differing results when considering in other slip and fall cases involving icy conditions whether "special aspects" are present. In *Robertson*, the plaintiff was a regular customer of the defendant gas station and fell while walking across a parking area to defendant's convenience store to purchase coffee and windshield washer fluid. Although the icy conditions were open and obvious, this Court concluded a question of fact was presented whether "special aspects" were present because "a reasonable trier of fact could rationally find that [the] plaintiff *was* 'effectively trapped' because it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield washer fluid." *Robertson, supra* at 594. On the other hand, in *Teufel* and *Joyce* this Court found that icy conditions were avoidable. In *Teufel*, the plaintiff fell in the icy parking lot of the defendant's apartment complex. This Court concluded that the icy conditions were avoidable because the plaintiff testified that reasonable and safer alternatives were available to him. *Teufel, supra* at 429. Specifically, safer parking spaces were available albiet further from the plaintiff's apartment than where he parked and fell. *Id*. The plaintiff in *Joyce*, a former in-home caregiver, fell on the walkway leading to the defendants' front door when coming to remove the remainder of her belongings. The plaintiff maintained one of the defendants insisted she complete her move on the day of her fall when conditions were snowy and dangerous. *Joyce, supra* at 232. After concluding the condition of the walkway was open and obvious, the Court rejected the plaintiff's argument it was "effectively unavoidable." *Id*. at 241. The Court observed that the plaintiff, "could have simply removed her personal items another day or advised [the defendants] that, if [they] did not allow her to use the garage door, she would have to move another day." *Id*. Further, the Court noted that the plaintiff, "could have used an available, alternative route to avoid the snowy sidewalk." *Id*.

Although in both *Robertson* and the instant case a slip and fall occurred on the premises of a gas station or former gas station, we find the legal reasoning of *Teufel* and *Joyce* more applicable to the facts here. First, plaintiff testified the purpose of his trip to defendants' premises on the day of his fall was to determine if he were scheduled to drive a cab that evening. When he entered the office to ascertain whether he was scheduled to work, he had to wait while the manager and dispatcher concluded the telephone and radio calls. Plaintiff left after he learned he was not scheduled to work. He fell while returning to his automobile. Plaintiff testified that he could have either called or visited the office: "I was due to call them or show up there and talk to someone." Although plaintiff also testified that someone told him he had to come in, plaintiff's testimony makes clear that he could have accomplished his stated purpose for going to A & A's office, determining whether work was available, by a simple telephone call.

Plaintiff's testimony also establishes that safer alternatives were available to him than parking in back of the building and traversing what plaintiff described as an "ice wasteland." Plaintiff acknowledged he had never parked in the back before but rather parked in front of the building. Plaintiff testified that although the front area was icy also, usually people parked in the

front because it was closer to a sidewalk. According to plaintiff: "You had to park in the front near the sidewalk if you wanted to get out of your car without falling." Plaintiff claimed an unnamed dispatcher "got in a tizzy over somebody taking his parking space out front, so we had to park in back." Plaintiff did not identify either the dispatcher or the person who told him he had to park in the back; defendant's manager denied that drivers were ever required to park in back of the building. In fact, he indicated they could park wherever a spot was available. Nevertheless, accepting plaintiff's version of this factual dispute as true, no reasonable juror could conclude that the safer alternative of parking in front of the building was unavailable to plaintiff because he also testified that he was the only person to comply with the alleged parking edict.

> *Q*. Now, you mentioned the area where you fell. Is it your testimony you were instructed to park in this back lot?
>
> *A*. I was told to park there. They didn't know for how long we had to park there, they just said to park there when we show up there.
>
> *Q*. Other than yourself, do you know if any other drivers were also instructed that they had to park in the back lot?
>
> *A*. They told everybody, but everybody else refused. They wouldn't park back there. Nobody would. They didn't care. They were all working there longer than I was, so they all - - I'm not parking back there. Nobody listened to anybody.

Establishing whether a special aspect exists depends on the condition of the premises, not that of plaintiff. *Mann, supra* at 329. Here, plaintiff's own testimony establishes that reasonably prudent persons appreciated the hazard of parking in back of the building and parked in the front, even if they had been told to park in the back. Plaintiff's idiosyncratic decision to park in the more hazardous back cannot create a "special aspect" when reasonably prudent people parked in the front. Thus, even accepting plaintiff's testimony that he was told to park in the back, special aspects do not render the open and obvious icy parking area unreasonably dangerous because it was not "effectively unavoidable." *Id*. at 332. "[N]o reasonable juror could conclude that the aspects of the condition were so unavoidable that [plaintiff] was effectively forced to encounter the condition." *Joyce, supra* at 242-243.

Plaintiff's claim that inadequate artificial illumination of the back parking area created a "special aspect" fails for the same reasons. Further, plaintiff testified there was exterior lighting at the northeast corner of the building, had he returned to his car by walking east along the front of the building and then north along the east side of the building, his path would have been better illuminated. Although this route would have been longer than the route he chose, it was a safer alternative available. Accordingly, inadequate artificial illumination was not a "special aspect" rendering the back parking area unreasonably dangerous. *Teufel, supra* at 429.

Last, plaintiff argues that alleged building code violations give rise to "special aspects" rendering the premises unreasonably dangerous. We disagree.

Plaintiff has failed to provide this Court with a copy of the local ordinance defendants are alleged to have violated; consequently, he has abandoned this argument. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). "'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Id*., quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Moreover, plaintiff's claim fails on the merits. The open and obvious doctrine operates to relieve a premises' possessor of a duty to exercise reasonable care to protect an invitee from unreasonable risk of harm caused by a dangerous condition on the land unless special aspects of the condition make it unreasonably dangerous. *Lugo*, *supra* at 516-517. Thus, when an open and obvious condition lacks special aspects, no duty of reasonable care exists with respect to it. An ordinance violation, in general, cannot impose such a duty because "although violation of an ordinance may be some evidence of negligence, it is not in itself sufficient to impose a legal duty cognizable in negligence."[1] *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994). Thus, an alleged ordinance violation "has little or no bearing upon the purely legal question whether [a] defendant owes [a] plaintiff a duty in the first place." *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 135; 463 NW2d 442 (1990). The critical query is whether an alleged ordinance violation evidences a special aspect of the hazardous condition rendering it unreasonably dangerous. *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003). Here, plaintiff simply argues the alleged building code violation contributed to the icy condition of the back parking area. But, as noted already, no special aspects existed with respect to this open and obvious condition. *Ververis*, *supra* at 66; *Corey*, *supra* at 8-9, n 1.

We affirm.

/s/ Michael J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter

[1] Notable exceptions to the general rule exist in the statutory duty to maintain highways in reasonable repair, MCL 691.1402(1), and similar statutory duty with respect to leased residential premises, MCL 554.139(1). See *Jones v Enertel, Inc*, 467 Mich 266, 268; 650 NW2d 334 (2002), and *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003).